

Texas Business Litigation

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2019

SOFIA ADROGUÉ, EDITOR
CAROLINE BAKER, CO-EDITOR



TEXAS LAWYER
An ALM Publication

TEXAS BUSINESS LITIGATION, 2019

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The advent of new statutes and changing regulations requires constant vigilance and careful attention by those who appreciate the importance of staying current in their representation of clients. That is the beauty of this treatise. Almost no topic of interest, especially to those who have a litigation practice, has been overlooked. Each of the 25 topics has been covered in depth. It can be used as a handy reference as the need arises.

I predict this publication will be the quick "go to" work for those who "enjoy" an active practice, whatever the area.

—Hon. Ruby Kless Sondock

Modern complex business litigation presents a witches' brew of risks to both sides. Controlling legal standards vary across possible venues. Discovery costs are potentially exorbitant. The challenge of persuasively communicating to courts and juries on issues which are foreign to them requires great imagination and skill. Realistic assessment of settlement values is a critical and difficult art.

The Editors have assembled a galaxy of some of the best trial lawyers in the nation to address the myriad issues raised. This work will be an invaluable resource for both trial lawyers and corporate counsel.

—Harry Reasoner, Senior Partner, Vinson & Elkins LLP



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About this Book

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—**Harry Reasoner, Senior Partner, Vinson & Elkins LLP**

TEXAS BUSINESS LITIGATION 2019 vii

About this Book

Litigation in the 21st century remains the subject of vigorous substantive debate and commensurate study. Some commentators have defined a 21st century litigator as “one who uses the court system only as a last resort if a dispute cannot be resolved outside its bounds.” It is undisputed that the jury trial faces extinction, with numbers in a precipitous decline across state and federal courts nationwide.

Indeed, in Texas state courts, almost in parallel with its federal brethren, approximately 0.50 percent of the Texas civil cases were disposed of by jury trial. According to the Annual Statistical Report for the Texas Judiciary, in fiscal year 2017, there were 220,661 cases that were disposed of in Texas courts with a jury selected in only 1,259 cases.

Combining 50 plus cumulative years of practice and 21 years on a state district court bench, we endeavor to remain at the forefront of the debate as institutions continue to seek a “roadmap for reform” of the 21st century civil justice system. With our 25 chapter treatise, we envisioned a work that would serve as an encyclopedia on business litigation—from A to Z—including some of the unexpected issues that may emerge such as a bankruptcy proceeding or a criminal investigation, along with applicable ethical considerations.

We sought to include truly the “Who’s Who of the Bar,” legendary trial lawyers and specialists, to analyze the following: (i) alternative dispute resolution; (ii) antitrust; (iii) bankruptcy ramifications in business litigation; (iv) breach of fiduciary duty claims in business transactions; (v) evaluation of business cases; (vi) contorts; (vii) corporate governance and regulatory proceedings; (viii) criminal law in business torts cases; (ix) damages; (x) discovery; (xi) employment law; (xii) experts; (xiii) fraud and negligent misrepresentation; (xiv) intellectual property and trade secrets litigation; (xv) ethics; (xvi) the liability case; (xvii) oil and gas; (xviii) preservation of error and appeal tactics; (xix) speech based torts: libel, slander, business disparagement, and invasion of privacy; (xx) third-party litigation finance; (xxi) business divorce; (xxii) jury trial innovations; (xxiii) e-discovery; (xxiv) construction litigation; and (xxv) tactical considerations in modern business trials.

The final three chapters of our 4th Edition are new and an indicia of the state of business litigation—e-discovery, construction litigation, and tactical considerations in modern business trials.

In our new e-discovery chapter, Dawn Estes elaborates upon the three principal issues that led to the substantive 2015 Amendments to the Federal Rules of Civil Procedure concerning e-discovery—“cooperation, proportionality and an increase in judicial involvement”—as addressed in *The Sedona Principles, Third Edition* (2018). As she expounds, *The Sedona Principles* are regularly cited by the courts as authority and often treated as a Restatement of Law. Her chapter skillfully navigates e-discovery, which is more often than not outcome-determinative in business litigation practice today.

As Michael J. Mazzone articulates in his construction litigation chapter, “[b]uilders are enterprising and optimistic. They fearlessly spend up to billions of dollars to construct homes, buildings, plants, highways, pipelines, and bridges. It is a testament to their competence that most construction projects succeed despite daunting challenges. But, some projects fail, sometimes spectacularly so.” As a result, “[f]ailed construction projects give rise to a surprising spectrum of possible claims” and “[t]he nature of the claims that litigators encounter in construction disputes is almost limitless.”

Our final new chapter explores tactical considerations in modern business trials. As John Zavitsanos informs us, “[f]or decades, trial lawyers passed down ‘rules’ about how to win a jury trial from one generation to the next. But modern jury trials have changed, in ways that make these so-called ‘rules’ obsolete. We all know jury trials are disappearing, and for those rare cases that make it to trial, the jury of today is a different animal from the jury of the 1980s and even the 1990s...Each trial presents unique tactical challenges that no set of rules can always answer. That is the job of the trial lawyer.”

Given the caliber of the formidable talent, we believe we provide 22 updated chapters and three new ones that reflect recent jurisprudence and additional arenas worthy of scrutiny as well as address statutory changes that are thoughtful, thorough and innovative.

About this Book

A spirited debate about the cause(s) of the vanishing trial continues along with the best manner in which to handle complex business torts litigation. Success in such matters requires creativity and advocacy skills. Ideally, our treatise, in its 4th Edition, will be of benefit.

We would like to thank our chapter authors and the ALM Team, with particular thanks to Marjorie Grodd, for her relentless work ethic and support.

We hope this treatise continues to serve as your business litigation template as you move your business litigation cases to trial.

Sofia Adrogué, Editor & Caroline Baker, Co-Editor
February 2019

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